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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

PHILLIP ANTHONY ESPARZA,

Defendant and Appellant.

B220047

(Los Angeles County  
Super. Ct. No. KA083952)

APPEAL from a judgment of the Superior Court of Los Angeles County,  
Tia Fisher, Judge. Affirmed.

Verna Wefald, under appointment by the Court of Appeal, for Defendant and  
Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant  
Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Blythe J. Leszkay  
and Shira B. Seigle, Deputy Attorneys General, for Plaintiff and Respondent.

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Phillip Anthony Esparza appeals the judgment entered following his conviction by jury of second degree murder and attempted murder in which he personally discharged a firearm causing death or great bodily injury. (Pen. Code, §§ 187, 664/187, 12022.53, subd. (d).) Esparza contends the evidence is insufficient to support the convictions and the firearm enhancements. We reject these contentions and affirm the judgment.

### **FACTUAL BACKGROUND**

#### *1. The People's case in chief.*

Esparza's convictions arise out of a shooting incident on June 27, 2007, in which 24-year-old Esparza attacked 46-year-old John Acosta and his older brother, Frank Acosta. All three men lived in the same neighborhood in Whittier which consists of four short cul de sacs that run south from Cambray Drive, which itself is a cul de sac.

John Acosta, the survivor of the attack, testified he and Esparza had been involved in prior confrontations.<sup>1</sup> One of these incidents occurred approximately two weeks before the shooting when John told Esparza to stop threatening Frank's teenage daughter, Amber, about money she owed on a vehicle she had purchased from a member of Esparza's family. The vehicle had been repossessed by Esparza's relative with Amber's identification in the vehicle. John requested the return of the identification and Esparza stated he would try to obtain it.

Approximately one week before the shooting, Brenda Acevedo, a civilian employee of the Industry Sheriff's Station, received a telephone call from an individual who identified himself as John who reported that a male gang member named Phillip Esparza was causing problems in the area of Cambray Drive. John did not recall making this telephone call but admitted he had called the sheriff's department a few times regarding stolen vehicles and people who smoked crack cocaine across the street from his home.

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<sup>1</sup> For clarity and convenience, in the factual summary of the evidence produced at trial, we refer to the Acosta brothers by their first names.

On the evening of June 27, 2007, Steven Trejo was walking on Cambray Drive from his home on Gala Street with Esparza and a friend named Greg. They stopped at Dela Street to smoke marijuana at an abandoned house. They heard Frank drive past them on Cambray Drive in his truck. Trejo noticed Frank and Esparza “mad-dogged each other” as Frank passed and heard them say something to each other. Frank stopped on Cambray Drive in front of John’s house. Esparza said something like he was tired of them “talking smack.” Esparza then said, “Fuck that,” “let’s go over there.” Trejo declined and went with Greg to Greg’s house on Dela Street.

John testified that at about 7:30 p.m. on June 27, 2007, he was in a neighbor’s front yard when he heard Frank’s truck arrive. John then heard Frank say, “He’s coming over here with the gun.” John looked up and saw Esparza approaching with a gun in his right hand. Esparza was swinging the gun front to back and then across his chest.

As Esparza approached, a neighbor stopped in a car to speak to John. The neighbor, Susana Rodriguez, was taking her daughter to the airport. Rodriguez testified John was standing in the street with Frank and Esparza. John did not approach the car and speak to them as he normally would. When Esparza said something, John turned, put his hands up and told him, “Wait a minute, man.” Esparza’s right hand was behind his back the entire time Rodriguez was there. Rodriguez considered calling 911 as they drove away.

John testified he wanted Rodriguez to leave for her safety so he “gave her the brush off . . . .” As Esparza got closer, Frank said, “Hey, there’s kids out here.” Esparza responded, “Fuck the kids” and “fuck you guys.” Esparza came directly up to Frank and John. Frank was upset about Esparza’s lack of concern for the children in the area. John pleaded with Frank to leave it alone and held Frank back with his arm. John heard a sound behind him and momentarily dropped his arm. He turned and heard a boom. John was struck in the hip by a round from Esparza’s gun and was knocked back. John saw Esparza shoot Frank twice in the chest causing Frank to fall to the ground. John asked Esparza to stop but he did not respond. John testified Esparza “was like an animal.” “He was out of control.” Esparza “went over there like an animal,

real wild . . . .” Esparza “stood right over [Frank,] . . . pointed straight down” and fired several more times. Esparza then ran from the scene.

Six expended nine-millimeter shell casings and two expended bullets were found at the scene.

The parties stipulated Frank suffered four gunshot wounds, including two fatal wounds to the chest and abdomen, and that stippling was present on three of the four entry wounds. No projectiles were recovered from Frank’s body.

## *2. Defense evidence.*

Esparza testified in his own defense. In June of 2007 he and Trejo were members of a small local gang. Esparza met John about a week before the shooting when they discussed a vehicle John’s niece had purchased from a member of Esparza’s family. At the end of the conversation, Esparza said he would see what he could do about the car and they separated on good terms. Esparza had never met Frank and did not know Frank and John were brothers.

On the afternoon of June 27, 2007, Esparza saw John on the corner of Gala Street and Cambray Drive. John was a passenger in a truck that stopped next to Esparza. John and the driver of the truck accused Esparza’s “little friends” of writing graffiti on the walls of the neighborhood and said they “better stop.” As the discussion became more heated, John and the driver got out of the truck and confronted Esparza. Esparza was offended and thought he was going to “get jumped.” Esparza returned to his home and reflected on the incident, then went to Trejo’s home to talk about what had happened and to obtain a gun. Esparza claimed he obtained the gun for protection because he feared John and the driver of the truck might “try to come back.” Esparza returned to his yard and then went to the corner to “stand right there.” After about five minutes, Trejo joined him.

As they stood there, Frank drove past, slowed down, looked at Esparza and then continued east on Cambray Drive. Esparza saw Frank stop and get out of the truck in front of John’s home. Frank stood in the street with two other males Esparza initially did not recognize. About five minutes later, one of the males whistled and gestured for

Esparza to come towards them. Esparza and Trejo walked in their direction but Trejo turned down Dela Street. Esparza was nervous and scared but he did not remove the gun from his pocket. When Esparza reached the group, he realized the other two males were John and individual who had been with John earlier that day.

Frank told Esparza he and his friends “better stop writing” graffiti and that Esparza and his “homeboys should get the fuck out of here.” Esparza responded he was not leaving and they argued for 5 or 10 minutes. During this time, the gun remained in Esparza’s pocket. John said nothing during the argument but held Frank back and repeatedly told Frank to calm down. Esparza became nervous and thought he was going to be attacked. Esparza held the gun by the grip in his pocket. At one point, Frank grabbed Esparza’s arm. Esparza fired the first shot while the gun was in his pocket. Esparza did not intend to fire the first shot which struck John.

When John fell to the ground, Frank came at Esparza and tried to put him in a headlock. Esparza ducked and removed the gun from his pocket. They struggled for the gun and, during the struggle, the weapon fired again, striking Frank in the chest. Frank then stepped back and Esparza “just did a couple more shots.” Esparza fired a total of seven rounds. Esparza denied he stood over Frank and shot him and testified Frank did not fall until the last shot was fired. Esparza ran to his mother’s home and discarded the handgun on the railroad tracks near Workman Mill Road.

Esparza admitted convictions of first-degree robbery in 2002 and possession of a controlled substance in 2006.

On cross examination, Esparza admitted he went down the block to confront the three males because he had a gun. On redirect examination, Esparza denied he intended to kill anyone and asserted he was under the influence of methamphetamine on the day of the incident.

Deputy Medical Examiner Lisa Scheinin testified in detail about each of the four gunshot wounds Frank suffered. Scheinin indicated only one of these wounds was consistent with having been inflicted while the victim was lying flat on the ground with the shooter standing directly over him. Another of the four wounds could have been

inflicted while the victim was lying on his right side but was inconsistent with the victim lying on his back. The remaining two wounds traveled across the victim's body and it was most likely these wounds had not been inflicted while the victim was on the ground.

### **CONTENTIONS**

Esparza contends there was insufficient evidence of malice to support the convictions of murder or attempted murder. He also contends there was insufficient evidence to support the true findings on the firearm enhancements.

### **DISCUSSION**

#### *1. Standard of review.*

When considering a challenge to the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Valdez* (2004) 32 Cal.4th 73, 104; *People v. Johnson* (1980) 26 Cal.3d 557, 576-578.) We presume in support of the judgment the existence of every fact the trier of fact reasonably could infer from the evidence. (*People v. Ramirez* (2006) 39 Cal.4th 398, 463.) We review the sufficiency of the evidence to support a firearm enhancement under the same standard. (*People v. Frausto* (2009) 180 Cal.App.4th 890, 897; *People v. Carrasco* (2006) 137 Cal.App.4th 1050, 1057.)

#### *2. The evidence supports convictions of murder and attempted murder.*

Esparza contends John Acosta's testimony established only that Esparza was out of control and acting like an animal when he shot Frank Acosta. According to Esparza, this testimony was insufficient to show Esparza intentionally committed an act, the natural consequences of which were dangerous to human life and that he was aware of the consequences of the act at the time. Esparza asserts the conviction must be reduced to voluntary manslaughter. For the same reasons, Esparza asserts there was insufficient evidence of malice to support a conviction of attempted murder. Esparza argues that conviction must be reduced to attempted voluntary manslaughter.

Second degree murder is defined as the unlawful killing of a human being with malice aforethought, but without the additional element that it be willful, deliberate and premeditated, which is required for first degree murder. (Pen. Code, §§ 187, subd. (a), 189; *People v. Nieto Benitez* (1992) 4 Cal.4th 91, 102.)<sup>2</sup> Malice may be express or implied. (§ 188; *People v. Taylor* (2004) 32 Cal.4th 863, 867.) Express malice is manifested when there is a “deliberate intention unlawfully to take away the life of a fellow creature.” (§ 188.) Malice may be, and usually must be, proved by circumstantial evidence. (*People v. Smith* (2005) 37 Cal.4th 733, 741.)

Here, there was evidence sufficient to support a finding of either type of malice. The nature of the attack, multiple gunshots to the chest fired at close range, suggested an intent to kill. (*People v. Halvorsen* (2007) 42 Cal.4th 379, 439 [sudden gunshot to head or neck at close range strongly indicates an intent to kill].) Thus, there was substantial evidence Esparza intended to kill and hence acted with express malice.

Alternatively, there was substantial evidence of implied malice in that the natural consequence of shooting an individual in the chest at close range is obviously dangerous to human life, Esparza knew his conduct endangered life and he acted in conscious disregard of that risk. (*People v. Taylor, supra*, 32 Cal.4th at pp. 867-868.) Thus, the evidence demonstrated Esparza harbored both express and implied malice in the murder of Frank Acosta.

Regarding the conviction of attempted murder, the mental state required to convict a defendant of attempted murder is the “intent to kill or express malice . . . .” (*People v. Smith, supra*, 37 Cal.4th at p. 741.) The “act of purposefully firing a lethal weapon at another human being at close range, without legal excuse, generally gives rise to an inference that the shooter acted with express malice.” (*Id.* at p. 742.) As this quotation exactly describes Esparza’s conduct toward John Acosta, the evidence was sufficient to establish that Esparza acted with express malice. Moreover, as in the case of the murder conviction, this evidence also showed implied malice.

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<sup>2</sup> Subsequent statutory references are to the Penal Code.

In sum, the evidence abundantly supported both convictions.

3. *The evidence supports the true findings on the firearm enhancements.*

Section 12022.53, subdivision (d), the provision at issue here, requires imposition of an additional, consecutive 25-years-to-life term when “the defendant ‘personally and intentionally discharges a firearm and proximately causes great bodily injury, as defined in Section 12022.7, or death, to any person other than an accomplice . . . .’ [Citations.]” (*People v. Palmer* (2005) 133 Cal.App.4th 1141, 1149.) Section 12022.53, subdivision (d) applies to both murder and attempted murder. (§ 12022.53, subd. (a)(1), (18).)

“ ‘A proximate cause of great bodily injury or death is an act or omission that sets in motion a chain of events that produces as a direct, natural and probable consequence of the act or omission the great bodily injury or death and without which the great bodily injury or death would not have occurred.’ ” (*People v. Bland* (2002) 28 Cal.4th 313, 335 [approving CALJIC No. 17.19.5 as the correct definition of proximate causation for the purpose of applying section 12022.53, subdivision (d)].)

The evidence in this case showed Esparza fulfilled each of the elements of section 12022.53, subdivision (d). He personally and intentionally fired a nine-millimeter handgun at John and Frank Acosta at close range and thereby caused great bodily injury to John Acosta, shooting him in the hip, and death to Frank Acosta, inflicting two fatal wounds to his chest.

Consequently, we reject Esparza’s contention the evidence was insufficient to support the firearm enhancements associated with his convictions of second degree murder and attempted murder.



**DISPOSITION**

The judgment is affirmed.

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KLEIN, P. J.

We concur:

CROSKEY, J.

ALDRICH, J.